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UK Employment Law Round-up

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In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the dangers of dismissing an employee in close proximity to a TUPE transfer; the agency worker regulations; when a disability becomes "long term"; and the government's proposals to tighten the use of NDAs and confidentiality clauses.

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IN THIS ISSUE

The dangers of dismissing an employee in close proximity to a TUPE transfer

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Facts

Ms Kaur worked as a cashier for H&W Wholesale Limited (H&W), whose directors were Mr Hare and Mr Windsor. She and her colleague, Mr Chatha, had a strained working relationship. In December 2014 it was decided that H&W would cease trading for financial reasons and Mr Windsor and Mr Hare would take on the business and employees of H&W as Hare Wines Ltd. Mr Chatha was to become a director of Hare Wines.

Mr Windsor held meetings with all seven employees of H&W on 9 December 2014. His last meeting was with Ms Kaur. Following the meeting he wrote to Ms Kaur advising that "due to unforeseen circumstances concerning the business, ... it would cease to trade". As a result, they would have to "terminate [her] employment as from today". Ms Kaur was the only employee who did not transfer to Hare Wines Ltd on 9 December. She brought a claim against H&W and Hare Wines Ltd (the Respondents) for redundancy pay, notice pay and, subsequently, for automatic unfair dismissal by reason of the TUPE transfer.

Ms Kaur and the Respondents presented two different versions of the meeting on 9 December. Ms Kaur claimed that she was told by Mr Windsor that she was being dismissed as Mr Chatha and Hare Wines Ltd did not want her to transfer. In contrast, Mr Windsor argued that he had told Ms Kaur that the business was being transferred to Hare Wines Ltd and that she had stated she was not happy working for them and did not want to transfer.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- Scottish Grocer – Mark Hamilton reports on pension obligations for part-time staff
- Scottish Grocer – Claire McKee reports on staying on the right side of work checks

If you have ideas for topics you'd like us to cover in a future round-up or seminar, please tell us here.

The legal issues

The purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is to protect the employees' rights when the organisation or service they work for transfers to a new employer.

Under Regulation 7 if the sole or principal reason for a dismissal is a TUPE transfer, the dismissal will be automatically unfair unless the reason is an economic, technical or organisational (ETO) reason entailing changes in the workforce.

The employment tribunal in Ms Kaur's case had to consider whether Ms Kaur was unfairly dismissed having regard to the facts of the case. In order to do that, the tribunal had to decide which version of events it preferred given that the burden of proving that there had been a dismissal was on the claimant (Ms Kaur).

The tribunal's decision

The employment tribunal concluded, on the balance of probabilities, that Ms Kaur did not object to the transfer so was dismissed and went on to decide that the sole or principal reason for the dismissal was the transfer.

Employer's appeals

Hare Wines Ltd unsuccessfully appealed the tribunal's decision to the Employment Appeal Tribunal and then to the Court of Appeal. One of the main arguments run by the company was that once the tribunal found that the reasons for the dismissal were "personal to the Claimant" (and existed independently of the transfer) it was not open to the tribunal to conclude that the

reason or principal reason for the dismissal was the transfer. Its alternative argument was that there was insufficient reasoning to show that the reason for the dismissal was the transfer.

Having regard to the evidence from both Ms Kaur and Mr Windsor considered by the tribunal, the Court of Appeal held that the employment judge "was entitled to believe" Ms Kaur. It referred to the CJEU case of Bork, which makes clear that, even though the proximity of a dismissal to the transfer is not conclusive, "it is often strong evidence in the employee's favour". This was particularly relevant in Ms Kaur's case as she was dismissed on the day of the transfer despite the fact that her relationship with Mr Chatha had been poor for some time without H&W seeking to terminate her employment. The court also criticised the phrase "purely personal reasons" used by Hare Wines Ltd to describe the reason for the dismissal and pointed out that "the law of unfair dismissal or of transfer of undertakings does not recognise such a category".

The court concluded that once it was found that Ms Kaur had not objected to the transfer "the central question became whether (a) she was dismissed because she got on badly with Mr Chatha (who was about to become a director of the business) and the proximity of the transfer was coincidental or (b) she was dismissed because the transferee did not want her on the books, the reason for that being that she got on badly with Mr Chatha". The court held that "which of these options was the sole or principal reason was a question of fact" and the employment tribunal "was entitled to" prefer option (b) over option (a).

Comments

The main reasons Hare Wines Ltd lost its case was the lack of consistency in its evidence and a poor paper trail of its discussions with Ms Kaur. This case is therefore a good example of what should be considered by a business anticipating dismissals and a TUPE transfer in order to limit the risk of a successful unfair dismissal claim. Our recommendations include:

1. Consider whether there is any scope for the dismissed employees to argue that their dismissals are transfer related. If the decision to terminate their contracts is not transfer related, ensure that you stipulate the reasons for terminating their employment clearly.
2. If the dismissal is transfer related, consider whether it is for an ETO reason and whether it involves changes to the numbers, functions or locations of the workforce.
3. Follow the appropriate information and consultation procedures and be transparent when discussing the proposed changes with the employees.
4. Ensure that you create an adequate paper trail confirming your communications with the employees. In particular, request a written copy of any employee's objection to the transfer.
5. Seek legal advice if in any doubt to limit the risk of claims resulting from the transfer.

Agency Worker Regulations: Where are we now

The use of agency workers has become increasingly prevalent in the workplace. Statistics from a recent ONS Labour Force Survey suggest that there are currently around 865,000 agency workers in the UK. This figure is expected to increase to one million by 2020. Although the Agency Worker Regulations have been in force since 2011 there have to date been very few appellate cases concerning its provisions. The recent decision of London Underground v Amissah therefore provides welcome guidance. At the same time further legislative changes are afoot. This article takes the opportunity to consider the current landscape in this area.

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Who is covered by the AWR?

An agency worker will work temporarily under the supervision and direction of a hirer (often also referred to as the end-user or client). However, the agency worker's contract of employment or engagement will be with the temporary work agency (also referred as the recruitment agency or simply the agency). Generally, an agency worker will be engaged by a hirer for specific pieces of work or for a fixed period.

The definition of agency worker under the AWR does not extend to those who are genuinely self-employed or individuals who are on permanent assignments. In the case or Moran and others v Ideal Cleaning Services Ltd, the Employment Appeal Tribunal (EAT) held that the AWR did not apply to a group of cleaners who had been assigned to one hirer for periods ranging from six to 25 years as their working arrangements were not temporary.

Rights of agency workers

The AWR derive from EU law, and are intended to prevent the exploitation of workers who may be perceived as "just a temp" and treated as a second-tier workforce. Under the AWR, agency workers are entitled to specific rights and protections which can be split into two categories: rights that arise on "day one" of the agency worker's engagement with the hirer and rights that do not apply until a 12 week qualifying period is satisfied.

Day one rights:

- The right to be treated no less favourably than a comparable employee or worker of the hirer in relation to access to collective facilities and amenities. Facilities can include canteens, childcare facilities, car parking, and transport services. Less favourable treatment can be objectively justified in certain circumstances, however, cost alone is generally not a sufficient reason.
- The right to be informed of any relevant vacancies in order to be given the same opportunity as a comparable worker to find permanent employment with the hirer.

The hirer is solely responsible and bears full liability for any breach of these "day one" rights.

Rights after 12 weeks

- The right to the same basic working and employment conditions as direct recruits of the hirer. This includes pay, rest periods and breaks, annual leave and paid time-off for antenatal appointments. In Kocur v Angard Staffing Solutions Ltd, the EAT confirmed that a term-by-term approach rather than a package approach should be adopted when comparing terms and conditions. This means that less favourable terms cannot usually be offset by a higher rate of pay.

Both the hirer and the agency are liable for breach of these rights. London Underground v Amissah provides helpful guidance as to how compensation will be calculated and apportioned, as discussed below.

There is no justification defence for breach of these rights. However, the AWR do provide an exemption in relation to pay (including holiday pay), which is commonly known as the "Swedish derogation". The exemption applies where an agency worker has a permanent contract (that must include certain specified provisions) with the temporary work agency, entitling the worker to pay between assignments.

It is important for businesses to note that the existence of such a contract does not affect the agency worker's entitlement to equal treatment in relation to other rights such as rest periods and unpaid annual leave after the 12 week qualifying period.

Compensation and liability

In London Underground v Amissah, a number of agency workers claimed that their right to equalised conditions under the AWR had been breached on the basis they had been paid less than comparable London Underground staff. Although London Underground had previously paid the agency sums to ensure that any underpayments were covered, this money had not in fact been passed on to the workers by the agency. By the time of the hearing the agency had gone into liquidation.

After applying the "just and equitable" test set out in the AWR, the Employment Tribunal decided that no compensation was payable by London Underground as this would mean that it would ultimately have paid for the underpayments twice.

The workers appealed. The EAT overturned the original decision and determined that compensation should be paid by London Underground to the extent that it was 50% responsible for the breach of the workers right to equalised conditions. Despite the fact that London Underground had paid the correct arrears to the agency, and it was the agency that had failed to pass this on to the relevant workers, the EAT found that it would not be just and equitable for the workers themselves to be deprived of compensation. London Underground had chosen to engage the particular agency and therefore should bear the burden of the agent's dishonesty, not the claimants.

The case is an important reminder that both the hirer and temporary work agency are responsible for ensuring compliance with the rights afforded to agency workers in relation to equalised conditions (after the 12 week qualifying period). Appropriate indemnities and cost sharing provisions should be considered in any agreements between hirers and agencies. Albeit that would not have assisted London Underground in this case as the agency had been liquidated. Hirers would therefore be well advised to undertake appropriate due diligence on counter-parties including where practicable as to their financial position.

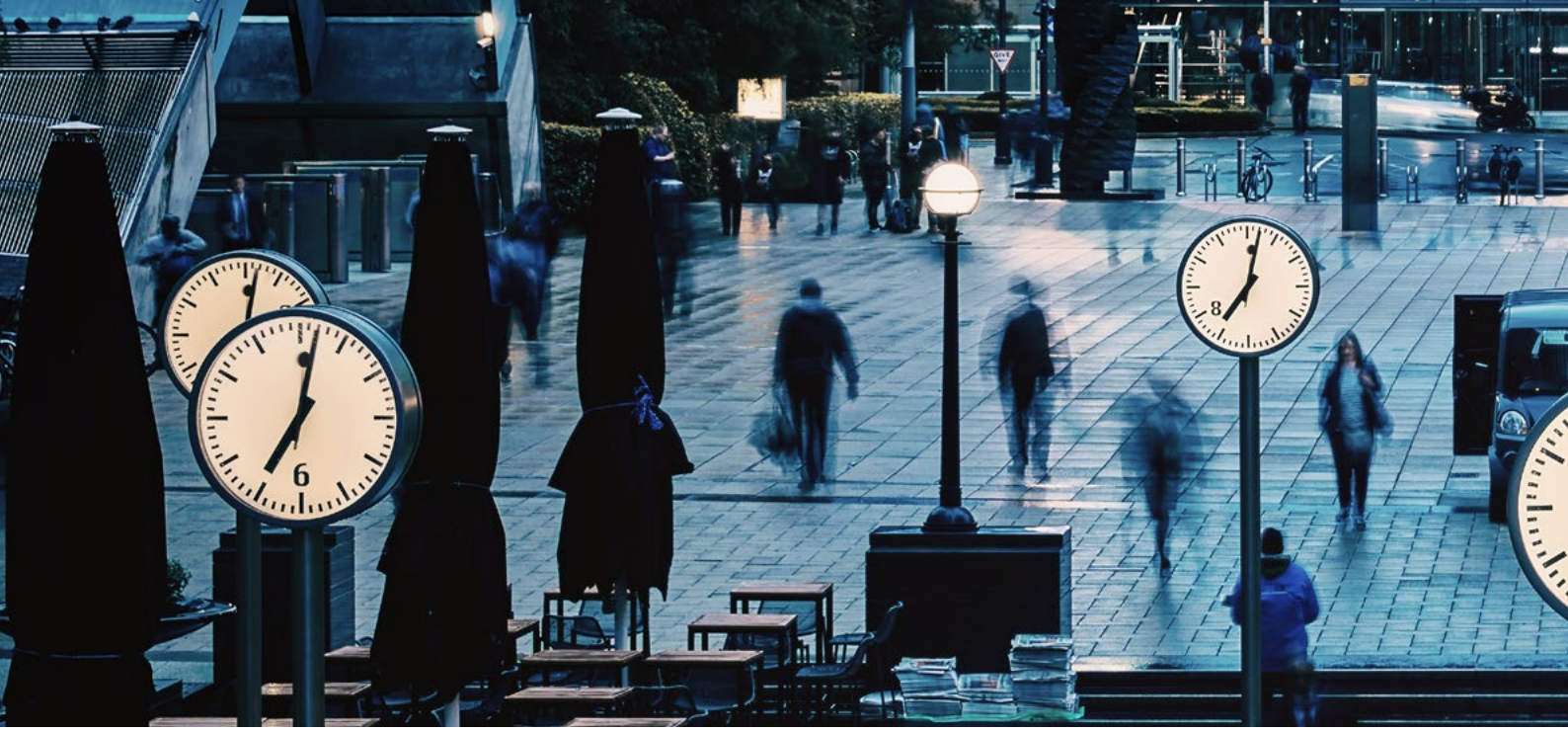
The future of the AWR

The Swedish derogation has always been unpopular with worker rights groups in the UK and has come under increased scrutiny in recent years. The 2017 Taylor Review included evidence to suggest that agency workers were not reaping the intended benefits of this derogation in the current work environment as they are engaged on long contracts and therefore do not actually have gaps in assignments. Concerns continue to be raised that the derogation is used exploitatively.

Following the Taylor Review recommendations, the Government published a number of proposals in its Good Work Plan. These proposals include several legislative reforms which aim to benefit agency workers, such as the abolition of the Swedish derogation. Draft regulations have now been put before Parliament for its abolishment from 6 April 2020. Once passed into law, this will mean that all agency workers have a right to pay parity after 12 weeks with no exceptions. The draft regulations also include an obligation on agencies that have previously relied on the exemption to provide a written statement to all affected agency workers explaining the change.

The Good Work plan outlined several other proposals relating specifically to agency workers, such as the right to a key facts page and state enforcement protections in certain circumstances where deductions are made by umbrella companies. If implemented, the proposals are designed to ensure that there is greater transparency and clarity about which entity pays an agency worker and their pay arrangements.

Agency workers and their rights are caught up in the drive for change that is currently part of the wider debate concerning the UK's casual workforce. Businesses that use agency workers, and other casual workers, should keep their practices and agreements under review as the landscape continues to shift.



EAT helps clarify when a disability becomes "long term"

In the recent case of Nissa v. Waverly Education Foundation, the Employment Appeal Tribunal helped clarify the definition of disability under the Equality Act 2010 and, in particular, helped shed light on how "long term", which forms part of the statutory definition, should be understood.

In the recent case of Nissa v. Waverly Education Foundation, the Employment Appeal Tribunal (EAT) helped clarify the definition of disability under the Equality Act 2010 (EA) and, in particular, helped shed light on how "long term", which forms part of the statutory definition, should be understood.

Background

Mrs Nissa had been employed by the Waverly Education Foundation (the Foundation) as a science teacher since September 2013. From December 2015, Mrs Nissa suffered from symptoms including fatigue, muscle stiffness and sensitivity to pain, which were later diagnosed as fibromyalgia.

She resigned on 31 August 2016 and brought a claim against the Foundation for disability discrimination under the EA. She claimed that the impairments had caused her to suffer a substantial and long term adverse effect on her ability to carry out normal day-to-day activities. Whilst the Foundation did not dispute that she was suffering from these conditions, they did not agree that she had a disability under the EA and contended that her impairments could not be classified as long term.

Relevant legislation

Under the EA, the criteria for determining whether an individual is disabled are as follows:

1. Does the person have a physical or mental impairment?
2. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
3. Is that effect substantial?
4. Is that effect long term?

Case law has established that a tribunal ruling on disability should consider these questions separately and sequentially and, while criteria 1 to 3 are contested regularly in their own right, it is criterion 4 that raises the most questions from employers and employees. Under the EA a physical or mental impairment can be considered long term if it has lasted 12 months, is likely to last 12 months, or is likely to last for the rest of the life of the person affected.

ET and EAT decisions

In the first instance, the Employment Tribunal (ET) found in favour of the Foundation and held that Mrs Nissa was not disabled under the EA as at no point during the relevant period (her employment) could it be said that the adverse effects of her impairments were likely to be long term, given that the only information available to the Foundation was the medical diagnosis provided two weeks before her resignation.

On appeal, the EAT concluded that the ET had erred in its judgment. The EAT followed the approach of the House of Lords in SCA Packaging Ltd v. Boyle and clarified that, in considering whether something would

be "likely", it is important to ask if it "could well happen". The ET should have asked if Mrs Nissa's impairment "could well" last more than 12 months, rather than ask if it was "probable" that it would. The ET had incorrectly focused on her diagnosis (which came late in the relevant period) rather than the effects of her impairments themselves.

Mrs Nissa had visited various clinicians between December 2015 and June 2016 and, although one of the GPs had referred to her condition as "fibromyalgia", the diagnosis was not applied consistently and the ET could also not find anything to suggest the clinicians expected her symptoms to be long term. When considered by the EAT, it was found that the ET had placed too much weight on the diagnosis and emphasis on a prognosis which referred to the possible amelioration in Mrs Nissa's symptoms.

The EAT highlighted that the existence of a diagnosis was evidentially relevant; however, the absence of such was not determinative.

It is also noteworthy that the Foundation sought to rely on later medical evidence in October 2016, stating that Mrs Nissa may slowly recover. The evidence was provided outside of the period of employment and the EAT was keen to point out that only evidence available at the time should be considered when considering whether a disability would be long term. The Foundation could not profit from the benefit of hindsight.

"The case has been remitted to a different tribunal for reconsideration."

Comment

The EAT's decision in this case is a clear reminder that, when determining whether an individual falls under the definition of disabled under the EA, a broad approach should be adopted. The diagnosis of a specific condition is relevant, however it should not be considered determinative of whether impairments resulting from that condition are long term.

Employers should ensure that, if an individual is diagnosed, clarity is sought regarding the period of impairment and future prognosis. Where an impairment is likely to last more than 12 months, employers should be aware of the low threshold that an employee needs to meet, and that the test is whether it "could well happen" that the impairment lasts more than 12 months.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- The gender pay gap – new guidance issued to help organisations close the gap
- What is the IR35 regime and why does it matter?
- The latest on employment/worker status
- The suspension of a teacher alleged to have used unreasonable force with pupils was not a repudiatory breach of contract

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Government proposes to tighten use of NDAs and confidentiality clauses

Non-disclosure agreements (NDAs) and confidentiality clauses have been under scrutiny recently, following the #MeToo movement. While many businesses legitimately use NDAs and confidentiality clauses to prevent disclosure of confidential business information, some employers are alleged to have sought to take advantage of these agreements and clauses and to be using them unethically in a manner intended to "silence victims".

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There is increasing evidence that confidentiality clauses are being abused by a minority of employers to intimidate victims and to conceal harassment and discrimination in the workplace – including sexual assault, physical threats and racism.

However, not all use of NDAs and confidentiality clauses is necessarily inappropriate. The government does recognise that they have a "right and proper place in the employment context", in relation to both employment contracts and settlement agreements.

It is common practice when an employee leaves their employment with an enhanced settlement (whether that be as a result of redundancy or misconduct) that the employer requires the employee to enter into an NDA or a settlement agreement. As part of this agreement, and usually as a condition of receiving the settlement payment, it is likely that the employee will be required to agree to maintain confidentiality as well as agreeing not to raise further grievances or legal claims against the employer. Such agreements are entirely normal, and can be used to protect the interests of both parties.

However, there is concern that confidentiality clauses are being used in some cases to silence victims of harassment, bullying and discrimination. There have been

recent examples of employees allegedly being paid large sums of money as an enticement to enter into NDAs to ensure that they remain silent about incidents that have taken place, including sexual harassment and race discrimination.

In order to address this the government announced, on Monday 4 March, new legal proposals which would tighten the rules around the use of NDAs and confidentiality clauses. Business Minister Kelly Tolhurst stated that the new proposals will "help to tackle this problem by making it clear in law that victims cannot be prevented from speaking to the police or reporting a crime and clarifying their rights". The proposals include legislating that confidentiality clauses cannot be used to prevent employees from reporting harassment or discrimination to the police.

There are already some limitations on confidentiality clauses. For example, they cannot remove an individual's statutory employment rights or override anti-discrimination law. They can also never remove a worker's right to "blow the whistle". Despite these limitations, confidentiality clauses can be drafted in a manner that many would see as unethical. There is some evidence that employers frame such clauses so widely that the terms suggest employees do not have such rights and cannot discuss the issue with anyone,

including the police. The consultation seeks views on the limitations that might be put on confidentiality clauses and NDAs, and offers legislation to clarify what these provisions cannot cover.

The government has also proposed to extend the law in relation to settlement agreements to require that an individual entering into such an agreement must receive independent legal advice which specifically covers the limits of the confidentiality clauses. The intention here is to prevent employees from being "duped into signing gagging clauses" which they were unaware of. In addition, the government proposes to require that settlement agreements meet certain wording requirements in relation to confidentiality.

Any agreement that did not meet these requirements would be void in its entirety.

The government is looking for feedback on experience with confidentiality clauses, and views on the its proposals. Any employer who wishes to participate in the consultation should send their responses to ndaconsultation@beis.gov.uk by 29 April 2019.

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